

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

U.S. ETHERNET INNOVATIONS, LLC,

No. C 10-3724 CW

Plaintiff,

ORDER GRANTING  
PARALLEL'S MOTION  
TO DISMISS (Docket  
No. 785)

v.

ACER, INC.; ACER AMERICA  
CORPORATION; APPLE, INC.; ASUS  
COMPUTER INTERNATIONAL; ASUSTEK  
COMPUTER, INC.; DELL, INC.;  
FUJITSU, LTD.; FUJITSU AMERICA,  
INC.; GATEWAY, INC.; HEWLETT  
PACKARD CO.; SONY CORPORATION;  
SONY CORPORATION OF AMERICA; SONY  
ELECTRONICS INC.; TOSHIBA  
CORPORATION; TOSHIBA AMERICA,  
INC.; and TOSHIBA AMERICA  
INFORMATION SYSTEMS, INC.,

Defendants,

INTEL CORPORATION; NVIDIA  
CORPORATION; MARVELL  
SEMICONDUCTOR, INC.; Atheros  
COMMUNICATIONS, INC.; and  
BROADCOM CORPORATION,

Intervenors.

Third Party Defendant Parallel Technology LLC moves to  
dismiss the complaint asserted against it by Intervenor Broadcom  
Corporation. Broadcom opposes the motion. Having considered the  
papers filed by the parties and their arguments at the hearing,  
the Court GRANTS Parallel's motion.

BACKGROUND

On April 18, 2013, Broadcom filed a first amended complaint  
in intervention and third party complaint against Parallel and  
Plaintiff U.S. Ethernet Innovations. Docket No. 735. In the

1 complaint, Broadcom makes the following allegations relevant to  
2 this motion.

3 USEI is an alter ego, and mere instrumentality, of Parallel.  
4 Compl. ¶¶ 8, 10. It is a wholly-owned subsidiary of Parallel,  
5 which is the manager and sole member of USEI, and Parallel's  
6 directors are the only officers of USEI. Id. at ¶¶ 8, 11-15. In  
7 addition, USEI is an agent of Parallel. Id. at ¶ 9. Parallel  
8 causes, directs or is otherwise responsible for the activities of  
9 USEI, including its filing of patent infringement suits. Id. at  
10 ¶ 17.

11 3Com Corporation was the original assignee of the patents-in-  
12 suit. Id. at ¶ 1. In 2004, Broadcom and 3Com entered into an  
13 agreement, which gave Broadcom a license and associated rights to  
14 practice the patents-in-suit. Id. at ¶ 19.

15 In 2009, 3Com sold the asserted patents to Parallel pursuant  
16 to a patent sale agreement. Id. at ¶ 25. The sales contract  
17 identified the agreement between Broadcom and 3Com as an  
18 encumbrance on 3Com's rights to the patents. Id. at ¶ 27. In  
19 executing the sale agreement, Parallel acknowledged that it  
20 received, and had sufficient time to review, the agreement between  
21 Broadcom and 3Com. Id. at ¶ 28.

22 In 2009, Parallel assigned the patents-in-suit to USEI. Id.  
23 at ¶ 30; see also id. at ¶ 20 (stating that USEI is the current  
24 assignee of these patents). Broadcom alleges that Parallel's  
25 assignment of the patents to USEI did not recite or otherwise  
26 provide for any encumbrance, including that which had been set  
27 forth in the sale agreement between 3Com and Parallel, and that  
28

1 Parallel made this assignment with the intention of evading that  
2 encumbrance. Id. at ¶¶ 32-33, 61.

3 On October 9, 2009, USEI filed the original complaint in this  
4 action. Id. at ¶ 36. In its complaint, USEI accused a number of  
5 Broadcom's customers of making, using, selling, offering to sell  
6 or importing products that allegedly infringe the asserted  
7 patents. Id.

8 Broadcom asserts a claim for intentional interference with  
9 contractual relations against Parallel. Broadcom alleges that  
10 Parallel caused or directed USEI to bring allegations of  
11 infringement of the patents by Broadcom products. Id. at ¶ 62.  
12 It further alleges that this was contrary to Broadcom's rights  
13 under its agreement with 3Com and that Parallel disrupted and  
14 interfered with Broadcom's rights under that agreement. Id. at  
15 ¶¶ 62-63. As a result of this interference, "Broadcom has  
16 incurred, and continues to incur, including without limitation the  
17 attorneys' fees, costs and expenses incurred in defending against  
18 USEI's allegations of infringement of the Asserted Patents by  
19 Broadcom Products." Id. at ¶ 65; see also id. at 8 (demanding  
20 such damages in the prayer for relief).

#### 21 LEGAL STANDARD

22 A complaint must contain a "short and plain statement of the  
23 claim showing that the pleader is entitled to relief." Fed. R.  
24 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
25 state a claim, dismissal is appropriate only when the complaint  
26 does not give the defendant fair notice of a legally cognizable  
27 claim and the grounds on which it rests. Bell Atl. Corp. v.  
28 Twombly, 550 U.S. 544, 555 (2007). In considering whether the

1 complaint is sufficient to state a claim, the court will take all  
2 material allegations as true and construe them in the light most  
3 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
4 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
5 to legal conclusions; "threadbare recitals of the elements of a  
6 cause of action, supported by mere conclusory statements," are not  
7 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
8 (citing Twombly, 550 U.S. at 555).

9 When granting a motion to dismiss, the court is generally  
10 required to grant the plaintiff leave to amend, even if no request  
11 to amend the pleading was made, unless amendment would be futile.  
12 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
13 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
14 amendment would be futile, the court examines whether the  
15 complaint could be amended to cure the defect requiring dismissal  
16 "without contradicting any of the allegations of [the] original  
17 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
18 Cir. 1990).

#### 19 DISCUSSION

20 Parallel moves to dismiss Broadcom's claim on the basis that  
21 it is barred by the litigation privilege and under the California  
22 Supreme Court's rule set forth in Pacific Gas & Electric Co. v.  
23 Bear Stearns & Co., 50 Cal. 3d 1118 (1990) (hereinafter, PG&E).  
24 It further contends that Broadcom has not plead a plausible claim  
25 against it.

#### 26 I. Litigation privilege

27 California Civil Code section 47(b) provides that  
28 communications made in or related to judicial proceedings are

1 absolutely immune from tort liability. The California Supreme  
2 Court has explained that the purpose of the privilege is "to  
3 afford litigants . . . the utmost freedom of access to the courts  
4 without fear of being harassed subsequently by derivative tort  
5 actions." Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990). "The  
6 litigation privilege applies to any communications (1) made in a  
7 judicial proceeding; (2) by litigants or other participants  
8 authorized by law; (3) to achieve the objects of the litigation;  
9 (4) that have some connection or logical relation to the action."  
10 Sharper Image Corp. v. Target Corp., 425 F. Supp. 2d 1056, 1077  
11 (N.D. Cal. 2006) (citing Silberg, 50 Cal. 3d at 212). Once these  
12 requirements are met, section 47(b) operates as an absolute  
13 privilege. Silberg, 50 Cal. 3d at 216.

14 The privilege is quite broad. It covers "any publication  
15 required or permitted by law in the course of a judicial  
16 proceeding to achieve the objects of the litigation, even though  
17 the publication is made outside the courtroom and no function of  
18 the court or its officers is involved." Id. Courts have applied  
19 the litigation privilege to all tort claims, with the exception of  
20 malicious prosecution. Edwards v. Centex, 53 Cal. App. 4th 15, 29  
21 (1997). "The requirement that the communication be in furtherance  
22 of the objects of the litigation is, in essence, simply part of  
23 the requirement that the communication be connected with, or have  
24 some logical relation to, the action, i.e., that it not be  
25 extraneous to the action." Silberg, 50 Cal. 3d at 219-20. "Any  
26 doubt about whether the privilege applies is resolved in favor of  
27 applying it." Kashian v. Harriman, 98 Cal. App. 4th 892, 913  
28 (2002).

Broadcom disputes that the litigation privilege applies to bar its claim against Parallel for two reasons. First, it argues that Parallel cannot benefit from the protections of the litigation privilege because it is not a litigant in USEI's underlying claim or another participant authorized by law. However, as this Court has recognized previously, "those non-litigants possessing a 'substantial interest in the outcome of the litigation' are 'authorized participants' for purposes of the litigation privilege." Sharper Image Corp. v. Target Corp., 425 F. Supp. 2d 1056, 1077 (N.D. Cal. 2006) (quoting Costa v. Superior Court, 157 Cal. App. 3d 673, 678 (1984)); see also Adams v. Superior Court, 2 Cal. App. 4th 521, 529 (1992) ("the privilege is not restricted to the actual parties to the lawsuit but need merely be connected or related to the proceedings") (citing Profile Structures v. Long Beach Bldg. Material Co., 181 Cal. App. 3d 437, 443 (1986)). Further, as Parallel points out, Broadcom has alleged that USEI is the "alter ego," "mere instrumentality" and "agent" of Parallel. Compl. ¶¶ 8-10. Broadcom has also alleged that the Parallel is in fact responsible for USEI's activities, including its filing of patent infringement suits. Id. at ¶ 17. Taking Broadcom's allegations as true, Parallel is a party to the underlying lawsuit and has a substantial interest in its outcome. Accordingly, Parallel may invoke the litigation privilege.

Broadcom also argues that the "tortious conduct of which Parallel is accused is not communicative." Opp. at 10. "Because the litigation privilege protects only publications and communications, a threshold issue in determining the applicability

1 of the privilege is whether the defendant's conduct was  
2 communicative or noncommunicative." Jacob B. v. County of Shasta,  
3 40 Cal. 4th 948, 957 (2007) (internal quotation marks and  
4 citations omitted). "The distinction between communicative and  
5 noncommunicative conduct hinges on the gravamen of the action."  
6 Rusheen v. Cohen, 37 Cal. 4th 1048, 1058 (2006) (citations  
7 omitted). "That is, the key in determining whether the privilege  
8 applies is whether the injury allegedly resulted from an act that  
9 was communicative in its essential nature." Id. "[I]f the  
10 gravamen of the action is communicative, the litigation privilege  
11 extends to noncommunicative acts that are necessarily related to  
12 the communicative conduct." Id. at 1065. "Stated another way,  
13 unless it is demonstrated that an independent, noncommunicative,  
14 wrongful act was the gravamen of the action, the litigation  
15 privilege applies." Id.

16 Broadcom contends that the conduct of which it accuses  
17 Parallel--which it characterizes as "creating a shell company,"  
18 "assigning the Patents-in-Suit to that shell company," and  
19 "financing this litigation"--is not communicative.<sup>1</sup> However, the  
20 gravamen of Broadcom's intentional interference claim against  
21 Parallel is that it directed USEI's allegations of infringement,  
22 which purportedly interfered with Broadcom's rights under its  
23 agreement with 3Com. Put another way, Parallel's establishment of  
24 USEI, its assignment of the patents to USEI and its financing of  
25 this litigation do "not provide an independent basis for liability

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26 <sup>1</sup> The Court also notes that Broadcom alleged in its complaint  
27 that Parallel is "responsible for" this litigation but did not  
28 allege that Parallel "financed" the litigation.

1 separate and apart from" the filing of the lawsuit, and thus the  
2 filing is the gravamen of the action. See id.

3 Accordingly, the litigation privilege bars the intentional  
4 inference with contract claim that Broadcom has plead here and the  
5 Court grants Parallel's motion to dismiss.

6 II. The California Supreme Court's decision in PG&E

7 As a separate and additional ground for dismissal, Parallel  
8 contends that Broadcom's intentional interference with contract  
9 claim fails because Broadcom did not plead that the underlying  
10 litigation lacked probable cause and terminated in its favor and  
11 cannot do so until the litigation has reached a resolution.

12 In PG&E, Pacific Gas & Electric (PG&E) sued Bear Stearns &  
13 Company, an investment brokerage firm, for intentional  
14 interference with its contract with Placer County Water Agency and  
15 for intentional interference with prospective business advantage,  
16 among other things. 50 Cal. 3d at 1123-24. Placer County wanted  
17 to terminate the contract but felt it could not do so without a  
18 breach. Id. at 1124. Bear Stearns approached Placer County and  
19 eventually entered into an agreement with it to investigate the  
20 feasibility of terminating the contract, in return for a  
21 percentage of any resulting increase in the county's revenues.  
22 Id. at 1124. Thereafter, Placer County served a demand for  
23 arbitration on PG&E to resolve the question of whether it could  
24 terminate the contract without a breach. Id. PG&E responded by  
25 filing several lawsuits, including the one at issue in PG&E. Id.  
26 Then, Placer County withdrew its arbitration demand and sought  
27 declaratory judgment that the contract could be terminated. Id.  
28



1 The trial court dismissed PG&E's claims for intentional  
2 interference.

3 In upholding the trial court's decision, the California  
4 Supreme Court considered, among other things, "whether it is  
5 proper to impose liability for inducing a potentially meritorious  
6 lawsuit" and concluded "that it is not." Id. at 1127. In  
7 reaching this conclusion, the court explained, "Under existing  
8 law, the only common law tort claim that treats the instigation or  
9 bringing of a lawsuit as an actionable injury is the action for  
10 malicious prosecution," and under that tort, the "actionable harm  
11 is in forcing the individual to expend the financial and emotional  
12 resources to defend against a baseless claim." Id. at 1130-31  
13 (emphasis in original; citation omitted). Thus, "[t]he bringing of  
14 a colorable claim is not actionable; plaintiff in a malicious  
15 prosecution action must prove that the prior action was brought  
16 without probable cause and was pursued to a legal termination in  
17 plaintiff's favor." Id. at 1130-31.

18 The court noted that, for a malicious prosecution claim, the  
19 "probable cause requirement is essential to assure free access to  
20 the courts" and stressed that "if the bringing of a colorable  
21 claim were actionable, tort law would inhibit free access to the  
22 courts and impair our society's commitment to the peaceful,  
23 judicial resolution of differences." Id. at 1131. The court  
24 reasoned, "To permit a cause of action for interference with  
25 contract . . . to be based on inducing potentially meritorious  
26 litigation on the contract would threaten free access to the  
27 courts by providing an end run around the limitations on the tort  
28 of malicious prosecution." Id. at 1137. The court therefore held

1 that "a plaintiff seeking to state a claim for intentional  
2 interference with contract or prospective economic advantage  
3 because defendant induced another to undertake litigation, must  
4 allege that the litigation was brought without probable cause and  
5 that the litigation concluded in plaintiff's favor." Id.

6 Broadcom appears to argue that the holding in PG&E should not  
7 apply here because, in the underlying litigation in that case,  
8 Placer County sought a judgment adjudicating its rights under a  
9 contract, which is different than the underlying claim brought  
10 here. Opp. at 11. Broadcom, however, has not cited any court  
11 that reached this conclusion and the PG&E court did not frame it  
12 in such a narrow way. Further, numerous courts have applied the  
13 holding in contexts other than claims seeking to ascertain rights  
14 under an agreement, including where the underlying action was for  
15 patent infringement. See, e.g., Visto Corp. v. Sprogit Techs.,  
16 Inc., 360 F. Supp. 2d 1064, 1072-1073 (N.D. Cal. 2005) (patent  
17 infringement); see also Formula One Licensing, B.V. v. Purple  
18 Interactive Ltd., 2001 U.S. Dist. LEXIS 2968, at \* 15-16 (N.D.  
19 Cal.) (trademark infringement).

20 Broadcom has failed to plead that the litigation concluded in  
21 its favor or that it was brought without probable cause and thus  
22 has failed to state a claim for intentional interference with  
23 contract. Broadcom disputes primarily whether it could plead this  
24 prior to the resolution of that litigation. Although Broadcom  
25 acknowledges that "there must be a favorable termination of the  
26 entire underlying action to give rise to a malicious prosecution  
27 claim," Opp. at 12 n.13 (emphasis added), it nevertheless argues  
28 that it meets this requirement because the underlying litigation

1 purportedly has been partially resolved in its favor. In support  
2 of this, Broadcom contends that USEI had recently written to  
3 Broadcom stating that certain products for which Broadcom had  
4 previously paid royalties to 3Com were inadvertently included in  
5 USEI's infringement contentions. It argues that it has thus  
6 prevailed on the "claims against" these products. However,  
7 Broadcom cites no case in which a court has permitted an  
8 intentional interference claim to proceed based on litigation that  
9 is still ongoing even in part.

10 Accordingly, the Court grants Parallel's motion to dismiss  
11 Broadcom's intentional interference claim for this independent  
12 reason as well. Because the Court has dismissed Broadcom's claim  
13 in its entirety based on the litigation privilege and PG&E, the  
14 Court does not reach Parallel's alternative grounds for its  
15 motion.

#### 16 CONCLUSION

17 For the reasons set forth above, the Court GRANTS Parallel's  
18 motion to dismiss (Docket No. 785). This dismissal is without  
19 prejudice to Broadcom filing an amended complaint to correct the  
20 deficiencies identified above within two weeks of the resolution  
21 of the underlying litigation.

22 IT IS SO ORDERED.

23  
24 Dated: 8/12/2013

  
CLAUDIA WILKEN  
United States District Judge